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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, ROBERT W. JAFFKE, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 2, 1957.

OPINION BELOW AND PRIOR OPINIONS IN THIS CAUSE

The opinion of the Court of Appeals ir question, printed at page 1a of the Appendix hereto, is reported in 243 F. 2d 460 (7th Cir.).

The prior opinion of the Court of Appeals entered on January 13, 1956, and modified on February 13, 1956, printed at page 8a of the Appendix hereto, is reported in 229 F. 2d 232 (7th Cir.).

The opinion of this Court reversing the judgment of the Court of Appeals for the 7th Circuit as referred to above and as amended on February 13, 1956, appears at page 17a of the Appendix hereto, and is reported in 352 U.S. 280, 1 L. Ed. 2d 314.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1957. The jurisdiction of this Court was invoked under 28 U.S.C. section 1254 and 11 U.S.C. section 47.

QUESTIONS PRESENTED

Where this court, in remanding and reversing the judgment of the Court of Appeals which had reversed the trial court's original judgment, ruled that the Court of Appeals erred in failing to consider documentary evidence stricken by the trial court and urged by appellee without cross appeal in support of the trial court's judgment, was it error for the Court of Appeals on remand to reverse the judgment of the trial court solely upon evidence stricken by the trial court?

The question is, when a Court of Appeals held that a trial court's finding of fact is not supported by the record without an affidavit which was first admitted and then stricken from the evidence in the trial court, and refuses

to consider such affidavit because there was no cross appeal filed, and then upon being directed by this court to consider the admissibility and weight of the affidavit since any evidence or exhibits in the record may be considered to affirm or sustain a trial court's judgment, did the Court of Appeals compound its error and unduly prejudice the appellee by considering other evidence or exhibits not admitted in evidence for the purpose of reversing a trial court's judgment; and particularly, where the appellant in his appeal did not assign as error or argue that the trial court's refusal to admit such evidence was error or a ground for a reversal of the trial court's judgment?

Another question in this case is whether or not the Court of Appeals applied the correct local law on the issue of imposing a constructive trust in a bankrupt's estate where the Court of Appeals in its opinion and reversal of the trial court's judgment refused to consider the duties of the trustee in the administration of a turnover order after the bankrupt's adjudication in bankruptcy and the bankrupt's relationship to an innocent third party at a time when such bankrupt was making payments under the turnover order?

STATEMENT

This cause came before the United States Court of Appeals for the 7th Circuit on remand pursuant to opinion and mandate of this Court in cause No. 60—October Term, 1956, opinion entered per curiam on January 14, 1957, and reported in 352 U.S. 280, 1 L. Ed. 2d 314, reversing and remanding the judgment of the Court of Appeals. The former judgment of the Court of Appeals for the 7th Circuit had reversed an order and judgment of the District Court for the Southern District of Illinois, Southern Division, sitting in bankruptcy which required the respondent as trustee of a bankrupt's estate to pay Twenty-seven Thousand Four Hundred Dollars ($27,400.00) to petitioner.

The Court of Appeals held in its opinion that the petitioner failed to prove that any specific portion of the money which he had given the bankrupt had become a part of the funds in the hands of the respondent since it did not consider the bankrupt's affidavit showing that specific monies received by the bankrupt from the petitioner became a part of the trustee's funds. This affidavit had been stricken from the evidence by the District Court, although it was a part of the record on the appeal to that Court.

This Court, in reversing and remanding this cause to that Court, stated that a successful party in the District Court may sustain its judgment on any ground that finds support in the record. The opinion further stated that if the District Court was in error in striking an admissible affidavit, a cross appeal was not a prerequisite for the Court of Appeals to rule upon the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. Since

the Court of Appeals had not considered the admissibility and weight of the affidavit, this Court remanded the cause to that Court for its consideration of those issues. Further, this Court in its remand directed that the Court of Appeals determine whether relevant admissible evidence in the case established a constructive trust under Illinois law.

On remand the Court of Appeals, without a rehearing in this cause, requested of the respective counsel that suggestions in typewritten form be submitted to the court directed to the questions of the admissibility of the bankrupt Knetzer's affidavit and the establishment of a constructive trust against the bankrupt's estate. On May 2, 1957, the court entered its opinion, again reversing the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

A. The Effect of the Decision on Appeal From and Remandment to Lower Courts

This Court should grant this Petition not only because the Court of Appeals refused to follow the decision of this Court in this case and failed to obey its mandate, but also because the decision is in conflict with the decisions of this Court.

The decision of the Court of Appeals sought to be reviewed was rendered after remandment from this Court. Petitioner was the successful party in the district court. The findings of fact of the district court and the decree were favorable to Petitioner. The Court of Appeals had expressly refused to sustain the findings of the district court that the money which the bankrupt, Knetzer, had defrauded from Petitioner had, in fact, been paid over to Respondent, and it failed to consider the ruling of the trial court striking the statement of the bankrupt as there

was no cross-appeal by the Petitioner to this action of the trial court.

This Court, in its remanding opinion, held that Petitioner had the right to urge in the Court of Appeals any matter in support of the trial court's judgment which he had relied on at the trial, including matters overlooked or ignored by the trial court. This court in its opinion in 352 U.S. 280, 1 L. Ed. 2d 314 cited the cases of *United States vs. American Railway Express*, 265 U.S. 425 and *Langnes vs. Green*, 282 U.S. 531, as controlling decisions in this Court for a reversal of the Court of Appeals' decision.

Since the Court of Appeals did not consider the admissibility or the weight of the affidavit, the mandate of this Court required the consideration of those issues. In its opinion on remandment, the Court of Appeals stated:

> "The record in this case clearly shows that at the time the Knetzer affidavit was obtained, August 1, 1952, Jaffke, the Petitioner, had learned that Knetzer could not be trusted. Earlier in 1952 Jaffke had appeared before the grand jury in Springfield and testified. As a result of that grand jury hearing an indictment was returned against Knetzer on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000.00, which was transported across state lines. (Appellee's Brief, Page 19.)"

And the court went on to say in the next to the last paragraph of its opinion:

> "The most serious threat of Knetzer serving a prison sentence was a pending indictment for fraud by the grand jury before which Jaffke had testified. This provided a very real reason for Knetzer to furnish any affidavit, even though false, requested by Jaffke which might help Jaffke recover at least part of the money Jaffke had paid to Knetzer."

The above quotations from the opinion in question here refer to an indictment which was introduced into evidence by the Petitioner as Exhibit No. 30 but was stricken in the trial court. Respondent, in his appeal, specifically excepted Exhibit No. 30 from his designation of the record. (Record, Page 174.) But, Petitioner in designating additional portions of the record included Exhibit No. 30 along with Exhibit No. 24, the affidavit of the bankrupt. Thus the Court of Appeals, in support of its reversal of the trial court's judgment, considered evidence stricken in the trial court.

The effect of this decision upon orderly appellate procedures may not be minimized. The Court of Appeals has initiated a rule that a losing party in the district court, on appeal, without assignment of error, may use evidence stricken on his own motion in the trial court as a basis for a reversal of the trial court's judgment. This is contrary to established law. A party on whose objection evidence was excluded cannot avail itself of such evidence in support of its contentions. It is in direct opposition to this Court's decision in this case that the Petitioner could urge any ground in the record in support of the trial court's judgment, where Petitioner was the successful party in the trial court and was endeavoring only to sustain the trial court's judgment.

The Court of Appeals, in its decision, committed substantial error in executing the mandate of this Honorable Court. It is settled law that an appeal will lie to correct this error and to cause a mandate to be executed according to its tenor and effect. *Cook vs. Porter, et al.*, 78 U.S. 672, 20 L. Ed. 84; *McMicken vs. Perin*, 20 How. 135; 15 L. Ed. 858; *Roberts vs. Cooper*, 20 How. 481, 15 L. Ed. 973. This Court said in *Baltimore and Ohio Railroad, et al. vs. United*

States of America, 73 L. Ed. 954, 279 U.S. 781 on page 956,

> "* * * When a lower federal court refuses to give effect to, or misconstrues, our mandate, its action may be controlled by this Court, either upon a new appeal or by a writ of mandamus."

When it becomes absolutely necessary to prevent injustice, as it appears the only interest of the Court of Appeals was to reinstate its prior reversal of the trial court's judgment, this Court should control its action. The lower court's decision is in conflict with the decisions of this court, and the conflict should be resolved by this Court.

B. The Effect of the Decision on Appellate Review of Trial Court Findings

It is a curious fact that the Court of Appeals in its original judgment reversing the trial court held that it could not consider evidence not admitted in the trial court to support the trial court's judgment without cross-appeal, but on remand considers evidence not admitted in the trial court as its grounds for a reversal of the trial court's judgment. This Court had directed the lower court to consider the admissibility and weight of Petitioner's Exhibit No. 24, and finding it admissible, to find that it afforded evidence in support of the district-court's judgment.

In substance, the Court of Appeals in its opinion sought to be reviewed here, held that it need not determine whether the statements in the affidavit were against the declarant bankrupt's pecuniary interest, as they fell short of having been made under circumstances regarded as rendering them trustworthy. (Page 5 of Opinion.) This simply went to the weight of the evidence, not to its admissibility. *F. W. Woolworth Co. vs. Contemporary Arts*, 97 L. Ed. 276, 344 U.S. 228. The affidavit was admissible and supported the trial court's finding that the Respondent Trustee had the possession of Petitioner's funds. Under the rules

of evidence applicable in Illinois and virtually every American jurisdiction following the common law of evidence, this affidavit would be admissible as an exception to the hearsay evidence rule. There was a necessity for the use of the declaration because the declarant was dead at the time of the trial. The declaration or statement was against the pecuniary interest of the declarant at the time it was made. Volume 20, Section 556 of American Jurisprudence states:

> "The theory under which declarations against interest are received in evidence notwithstanding that they are hearsay is that the necessity of the occasion renders the reception of such evidence advisable, and, further, that the reliability of such declaration is generally to be depended upon since a person does not ordinarily assert facts which are against his own pecuniary interest."

Also see Corpus Juris Secundum, Volume 31, Section 217 at 959.

The aforementioned cited requirements have been recognized in both Illinois and Federal decisions. *Keshner vs. Keshner*, 376 Ill. 354, 33 N.E. 877; *Friberg vs. Donovan*, 23 Ill. App. 58; *Hughes vs. Eldorado Coal and Mining Co.*: 197 Ill. App. 259; *Schell vs. Weaver*, 225 Ill. 158, 80 N.E. 95; and In Re Thompson, 205 Fed. 556; and *Clark and Jones vs. American Mutual Liability Insurance Company*, 112 Fed. Supp. 889 (1956).

The test it appears goes to a question of necessity and the fact that the statement was against the pecuniary interest of the declarant was enough to make it trustworthy. This doesn't necessitate a search into the veracity or character of the declarant, but goes to the weight. As a matter of fact in the instant case, there was no motive for the declarant to falsify. It was of no advantage to the bankrupt, Knetzer, to state that Respondent was possessed of Peti-

tioner's money because he thereby admitted the doing of the acts which were the essential elements of the crime for which he was charged in the indictment. It would appear that the indictment corroborated the affidavit and the indictment was offered for that purpose by Petitioner as Petitioner's Exhibit 30.

The circumstances surrounding the execution of the affidavit were testified to by R. W. Heinz, an Illinois attorney and an independent witness, who conferred with the bankrupt. (R. 103-104.) Heinz obtained permission to present the affidavit to the bankrupt from the proper government official. (R. 104.) He was present when the bankrupt signed the affidavit and admonished him as a prospective attorney for the bankrupt not to sign anything unless it was true. (R. 103.) The Respondent himself corroborated the declarations contained in the affidavit. (R. 88-89.)

Respondent's objection to the introduction of the affidavit was that it was an admission and hearsay. It was not offered as an admission, but as a declaration against interest. There is nothing in the statement that questions title to the money. It merely stated from whom the money was obtained and to whom it had been delivered. This distinction is clarified in 31 Corpus Juris Secundum, Second Section 217 at page 959 and In Re Thompson, 205 Fed. 556.

In addition, the record of payments by the bankrupt to Respondent sustained the trial court's finding of fact. (Petitioner's Brief, Page 8 and R. 193.) A finding of fact by a trial court must be clearly erroneous before disturbance by a court of review. Rule 52 (a) of Rules of Civil Procedure, *United States of America vs. National Assn. of Real Estate Boards, et al.*, 95 L. Ed. 1007, 339 U.S. 485; *United States vs. U. S. Gypsum Co.*, 92 L. Ed. 746, 333

U.S. 364; *Chain O. Mines vs. United Gilpin Corp.*, 109 F. 2d, 617; *Viles vs. Prudential Ins. Co.*, 107 F. 2d 696.

Other Circuit Courts of Appeals as well as this Court have held contrary to the decision questioned here reversing the trial court's finding and judgment. This decision and judgment should not be permitted to stand.

C. The Bankruptcy and Its Relation to Local Law on Constructive Trusts

This Court further directed the Court of Appeals in its remandment order to consider whether admissible evidence established a constructive trust under Illinois law. That court again ignored and misapplied applicable local law to this question and avoided facing the directions set forth in the mandate of this Court.

The trial court in its findings of facts, found all of the elements necessary to impress a trust. It cannot be forgotten that the Respondent obtained money in the form of payments under a turnover order and it is undisputed that Respondent failed to make even the most rudimentary investigation of the source of funds paid to him under that order. (R. 87, 79-80.) No evidence existed that the payments were concealed assets of the bankrupt. (R. 93-94.) The bankrupt, upon release from jail, was permitted to go where he pleased without a custodian, (R. 77, 85) and Respondent, in the face of a duty to inquire into the source of payments, accepted money payments from the bankrupt. To permit Respondent to retain property accepted with neither inquiry nor investigation when the circumstances commanded both, would be a harsh and inequitable result.

The Court of Appeals, in one of its own decisions, so held in the case of *Standard Oil Co. of Kentucky vs. Hawkins*, 74 Fed. 395, when it quoted from Ex Parte James, 9 Ch. at 609, and said on Page 400:

> "That a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he has money in his hands which, in equity, belongs to some one else, ought to set an example to the world, by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people"

This decision setting forth applicable Illinois law in this question was not considered by the court in its opinion. Other pertinent State and Federal decisions rendered by courts in Illinois and which have passed on this question are: *Winger vs. Chicago City Bank and Trust*, 394 Ill. 94, 67 N.E. 2d 265; *The People vs. State Bank of Maywood*, 354 Ill. 519; *Edgerton vs. Johnson*, 178 Fed. 2d 106, and *Soderstrom vs. Kungsholm Baking Co.*, 169 Fed. 2d 1008. All of the aforementioned decisions relate to the elements of a constructive trust, and detail the history of the problem of identification and tracing of funds impressed and indicate that recent decisions place a lesser burden on a claimant in identifying his property.

Only one case has been found which states the rule applicable to transactions occurring between a bankrupt and a third person subsequent to bankruptcy. This is a federal case in a sister state; the *City of New York vs. Rassner*, 127 Fed. 2d 703. It states the rule for tracing does not apply and was cited to this Court in Petitioner's brief to this Court, (Petitioner's Brief, Pages 15, 35 and 38). Also, this case was cited to the Court of Appeals on remand.

The Court of Appeals' refusal to comply with the mandate of this Court and its rendering of an opinion on an important question of local law in a way probably in conflict with applicable local questions results in a decision requiring review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

WILLIAM M. GIFFIN

Attorney for Petitioner.

1st APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11508 SEPTEMBER TERM 1956 - APRIL SESSION 1957

In the Matter of
ROBERT L. KNETZER, BANKRUPT
ROBERT W. JAFFKE
Petitioner-Appellee,
v.
WILLIAM C. DUNHAM, AS TRUSTEE OF THE ESTATE OF ROBERT L. KNETZER, BANKRUPT
Respondent-Appellant.

On remand from the Supreme Court of the United States

May 2, 1957

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* On January 13, 1956, this court reversed the judgment of the District Court which ordered that William C. Dunham, as trustee in bankruptcy, pay to the petitioner, Robert W. Jaffke, the sum of $27,400, on the theory that the petitioner had traced into the hands of the trustee that amount of funds which the bankrupt, Robert L. Knetzer, had procured from the petitioner by fraud. In our opinion, 229 F. 2d 235, we held that the evidence in this case was not sufficient to sustain the District Court's finding that Knetzer had paid over to the trustee the $36,000 which the bankrupt had obtained from the petitioner by fraud.

The Supreme Court of the United States granted certiorari, 351 U. S. 949, and reversed and remanded the cause to this court for our determination as to the admissibility and weight of an affidavit made by the bankrupt, Knetzer, on August 1, 1952. 352 U. S. 280.

In this affidavit Knetzer stated:

> "That during the period from December 7, 1950 to October 23, 1951, I, Robert L. Knetzer, borrowed the sum of $47,980.00 (Forty-seven thousand nine hundred eighty & no/100 dollars) from Robert W. Jaffke, of St. Louis, Missouri, and that during the period of December 7, 1950 to November 1, 1951, I paid the sum of $36,000.00 (Thirty-six thousand dollars) from the above borrowed sum of $47,980.00 to Wm. C. Dunham, Trustee in Bankruptcy of Robert L. Knetzer, for purposes of remaining out of jail. I am of sound mind and body and no threats or promises were made to me in order to obtain this statement."

The bankrupt died prior to the time the petition herein was heard. The trial court first admitted the bankrupt's affidavit, but at the conclusion of the hearing the court sustained the objection of the respondent-trustee to the

admission of the affidavit and struck it from the record as being inadmissible.

There is, and could be, no real dispute between the parties that the petitioner, under the facts of this case, was entitled to reclaim from the funds in the hands of the trustee in bankruptcy such amount, if any, as the bankrupt obtained from the petitioner by fraud and then traced into the hands of the trustee. See *People* v. *West Side Trust & Savings Bank*, 376 Ill. 339, 33 N.E. 2d 607; *Evans* v. *Moore*, 247 Ill. 60, 93 N.E. 118; *Woodhouse* v. *Crandall*, 197 Ill. 104, 64 N.E. 292; *Union National Bank of Chicago* v. *Goetz*, 138 Ill. 127, 27 N.E. 907. There was conflict in the evidence as to whether the bankrupt had obtained the money in question from the petitioner by fraud, but there was sufficient evidence to sustain the finding of the trial court that the petitioner was induced by the fraudulent misrepresentations of the bankrupt to pay most of the money which he paid over to the bankrupt, and the evidence showed that there were sufficient funds in the hands of the trustee to pay to Jaffke the amount claimed by him as a preferred claim. The petitioner contends that the District Court erred in granting the trustee's motion to strike the Knetzer affidavit from the record. Petitioner insists that the affidavit by Knetzer was a declaration against the pecuniary interest of the bankrupt and that since the bankrupt was dead at the time of the hearing the court should not have struck the affidavit from the record.

To determine this question it is necessary to review again some of the facts involved in the bankruptcy matter. Knetzer was adjudged a bankrupt on October 21, 1948. On August 11, 1949, the trial court found that Knetzer owned and was concealing assets in the amount of $250,000. The court then ordered Knetzer to turn over that amount to the

trustee in bankruptcy on or before November 1, 1949. On Knetzer's failure to comply with the court's order, he was found, on December 1, 1949, to be in contempt of court and was sent to jail to be confined until the turnover order was complied with. On different occasions Knetzer was released from jail on his solemn promise that he could and would procure the $250,000 and pay it to the trustee and thereby purge himself of contempt. However, Knetzer turned over to the trustee a total of only $79,923.72. On January 27, 1950, the trustee explained to the creditors that Knetzer was hopelessly insolvent; that all of his assets had been converted into cash; that the trustee had on hand only, $74,000; and that claims of over $3,500,000 had been filed in the bankruptcy matter. It was thus clearly shown that there was no possibility of there ever being any surplus in the hands of the trustee which would be payable to the heirs of Knetzer, who had died on August 26, 1953, leaving a widow and two children.

The record here is replete with evidence that Knetzer's sole purpose before he was adjudged a bankrupt was to defraud as many people as possible out of their money by false pretenses. After Knetzer was adjudged a bankrupt and sent to jail for contempt his primary purpose was to get out and stay out of jail and to accomplish this purpose he did not hesitate to do or say anything he considered necessary to obtain the funds required to purge himself of contempt and to avoid criminal prosecution.

The record in this case clearly shows that at the time the Knetzer affidavit was obtained, August 1, 1952, Jaffke, the petitioner, had learned that Knetzer could not be trusted. Earlier in 1952 Jaffke had appeared before the grand jury in Springfield and testified. As a result of that grand jury hearing an indictment was returned against Knetzer

on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000, which was transported across state lines. (Appellee's brief, page 19.) On the last $4,800 which Jaffke turned over to Knetzer in October of 1951, Jaffke required that Knetzer give him security. When the petitioner was asked why he required security on this last loan, he replied, "I had realized that this man [Knetzer] could not be trusted." Yet, knowing that Knetzer could not be trusted and that he was then in jail for contempt and facing trial on the indictment charging fraud, Jaffke prepared the affidavit here in question.

On page 39 of the appellee's brief in this court counsel for Jaffke frankly admit that: "It can be fairly stated that the trial court was not lenient in its rulings when plaintiff was presenting his case in chief, and strictly followed the rules of evidence applicable thereto." This blanket endorsement of the trial court's action on the question as to the admissibility of evidence included the court's refusal to permit the petitioner to answer the question as to whether Knetzer told him how much of the money Knetzer had received from him was paid over to the trustee in bankruptcy, and the striking of petitioner's answer that he received the information for the affidavit from Knetzer. Without these bits of testimony, Knetzer's affidavit stating that he paid $36,000 of the money he had "borrowed" from Jaffke to the trustee was the only evidence on which the tracing of petitioner's money into the hands of the trustee could stand.

We agree that a declaration against the declarant's existing pecuniary or proprietary interests by one with personal knowledge of the facts declared may, under certain circumstances, be properly admitted in evidence, but we do

not believe that this record discloses facts sufficient to bring the Knetzer affidavit within the exception to the hearsay rule of evidence even as that rule is stated by the petitioner. The petitioner states the claimed exception to the hearsay rule as follows: "However, where there is a necessity for the use of the declaration usually because the declarant at the time of the trial is dead, and *where the declaration is made under circumstances regarded as rendering it trustworthy,* and usually where the declaration or statement is against the interest of the declarant *at the time he makes the statement or declaration,* the declaration is admissible in evidence." (Emphasis added.)

We need not determine whether the statements in the Knetzer affidavit were against Knetzer's pecuniary interest. If the statements in the affidavit were against his pecuniary interest they fell far short of having been "made under circumstances regarded as rendering [them] trustworthy," one of the requirements which the petitioner admits was necessary to make the affidavit admissible. As we pointed out above, the trial court at first admitted Knetzer's affidavit, but after hearing all of the evidence in the case the trial court granted the trustee's motion to strike the affidavit from the record. The trial court could not have listened to all of the evidence in this case without realizing that statements made by Knetzer, sworn or unsworn, could not be relied upon. The most serious threat of Knetzer's serving a prison sentence was the pending indictment for fraud by the grand jury before which Jaffke had testified. This provided a very real reason for Knetzer to furnish any affidavit, even though false, requested by Jaffke which might help Jaffke recover at least part of the money Jaffke had paid to Knetzer.

The trial court properly struck the Knetzer affidavit from the record and without that affidavit no part of the money obtained by Knetzer from Jaffke was traced into the hands of the trustee.

The judgment of the trial court must be and it is

REVERSED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11508. JANUARY SESSION, 1956, OCTOBER TERM, 1955.

In the Matter of
ROBERT L. KNETZER, Bankrupt.

ROBERT W. JAFFKE,
Petitioner-Appellee,
vs.
WILLIAM C. DUNHAM, as Trustee of the Estate of ROBERT L. KNETZER, Bankrupt,
Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

January 13, 1956.

Before DUFFY, *Chief Judge*, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* This is an appeal from an order of the United States District Court for the Southern District of Illinois, Southern Division, sitting in Bankruptcy

in the Matter of Robert L. Knetzer, Bankrupt. The order appealed from required the trustee of the bankrupt estate to pay from the funds in his possession to the petitioner, Robert W. Jaffke, the sum of $27,400.00 which the court found that the bankrupt, Robert L. Knetzer, had procured from Jaffke by fraud subsequent to October 21, 1948, the date on which Knetzer had been adjudged a bankrupt.

The fraud by which Knetzer was alleged to have induced the petitioner to give him the money which petitioner seeks to reclaim from the trustee in bankruptcy consisted of representations by Knetzer to the petitioner made during the period from December 7, 1950, to and including March of 1951. These representations were that he (Knetzer) was the manager of a large corporation known as the Bison Construction and Mining Corporation in which a number of well to do men were interested; that this corporation of well to do men were interested; that this corporation was to build a large number of homes in a housing project near the Air Force Base at Great Falls, Montana; that a similar project which Knetzer had just finished promised to pay a 50 per cent profit; that an influential man was arranging for a loan to the corporation from the Reconstruction Finance Corporation, but that it was such a large scale operation that it would take two years to complete it and that in order to initiate the business the corporation needed money then; and that the investors in this project would share pro rata in the profits.

Jaffke's petition alleges that these representations by Knetzer were false and were known to Knetzer to be false but that they were believed by Jaffke to be true, and that by these false representations Knetzer induced Jaffke to give him for investment in the project money in the total sum of $47,980.00.

In the hearing on Jaffke's petition, Jaffke testified that because of Knetzer's false representations he (Jaffke) paid to Knetzer during the period between December 7, 1950 and October 22, 1951, both dates inclusive, a total of $47,980.00. Jaffke's petition alleged that of this amount Knetzer turned over to the defendant trustee the sum of $36,000.00.

In arriving at the amount of $27,400.00, which the trial court ordered that the petitioner recover from the trustee, the court apparently subtracted from the amount alleged to have been paid to the trustee by Knetzer, $3,800.00 which Jaffke admitted that he knew was to be paid to the trustee to keep Knetzer out of prison, and $4,800.00 which Jaffke admitted had been repaid to him by a relative of the bankrupt.

In seeking to set aside the order of the trial court the appellant trustee questions the admission of certain evidence which was received in the hearing on Jaffke's petition. The appellant first questions the competence of the testimony of the petitioner as to his dealings with Knetzer. The objection to this testimony is based on Section 2 of the Evidence Act of the State of Illinois, Illinois Revised Statutes, c. 51 § 2 (Bar Association Edition 1955). This statute provides in part:

> "No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee * * *."

The testimony of the petitioner was objected to on the ground that he was an "interested party" within the meaning of the statute for the reason that the respondent trustee was acting not only as trustee in bankruptcy for the creditors but also as trustee and representative for the widow and minor children who were heirs of the deceased bankrupt. The bankrupt, Knetzer, died prior to the hearing on the petition and left a widow and children.

We think this objection was not well taken. The obvious purpose of the Illinois statute is to protect persons under disability and the heirs of deceased persons, and Knetzer's heirs did not stand to gain anything out of the bankruptcy estate. During the period of time in which the false representations were made the bankrupt, Knetzer, was engaged in attempts to comply with a court order to turn over to the trustee the sum of $250,000.00, which represented the amount of assets which the court had found that Knetzer owned and had concealed. On Knetzer's failure to comply with the turn over order he was found to be in contempt of court and was sent to jail. The court permitted Knetzer to leave the jail on different occasions in the custody of the United States Marshal or of bailiffs of the court. This permission was granted on Knetzer's promises that he could and would use his freedom to procure the required $250,000.00 and thereby purge himself of contempt. During the period from December 7, 1950 to November 16, 1951, Knetzer procured and turned over to the trustee a total amount of only $79,923.72.

On January 27, 1950, the trustee wrote a letter to Knetzer's creditors explaining that Knetzer was hopelessly insolvent; that all of his assets had been sold and turned into cash; that the trustee then had on hand a total of

$74,000.00; and that claims in the total amount of $3,844,776.54 had been filed in the Knetzer bankruptcy matter.

From these undisputed facts it seems certain that Knetzer's only interest in his bankruptcy matter while he was alive was to try to get out or stay out of jail. It was certain that the trustee at the close of the bankruptcy proceeding could have nothing left to turn back to Knetzer. It follows that after Knetzer's death there could be nothing left to turn over to Knetzer's heirs. The contest here over the funds in the trustee's hands could only affect the petitioner and the other creditors. Under these circumstances we think the trial court did not err in admitting Jaffke's testimony as to his transactions with Knetzer.

The trustee points out that the petitioner filed this action against both Knetzer and the trustee; but the record shows that after the death of Knetzer, his death was suggested to the court and the action then proceeded against the trustee alone, pursuant to Rule 25 of the Federal Rules of Civil Procedure.

After carefully reviewing all of the evidence in this case it seems clear that there was a sufficient basis for the trial court's finding that Jaffke did pay to Knetzer the total sum of $47,980.00 because the petitioner believed the false statements that Knetzer made to him concerning the fictitious construction and mining corporation and the likelihood of large returns for those investing in it. But petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them

to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy.

But in the instant proceeding Jaffke claims that since Knetzer, after he had been adjudged a bankrupt, procured the amount of $47,980.00 from him by fraud and then paid $36,000.00 of that amount to the trustee, the money so paid did not become the property of the trustee because it was impressed with a trust in favor of the petitioner. Thus, argues the petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee.

To support his claim on this theory it was just as necessary for the petitioner to prove that the $36,000.00 was paid to and became a part of the funds in the hands of the trustee as it was to prove that Knetzer had procured this money by fraud. This we think the petitioner has failed to do. It is true that Knetzer in August 1952, while in jail, executed an affidavit stating that of the money he received from Jaffke he paid $36,000.00 to the trustee. This affidavit was tentatively received in evidence over the objection of counsel for the trustee but at the conclusion of the hearing the trial judge sustained the objection and the trustee's motion to strike Knetzer's affidavit from the record. There was no cross-appeal by the petitioner to question this action by the trial court, and this court may not consider Knetzer's affidavit as evidence in this case.

At the top of page 19 of petitioner's brief in this court we find the following statement:

> "Plaintiff's Exhibit No. 29 offered in evidence is a record of a prior proceeding, pursuant to an ad-

> joumed creditor's meeting, in this bankruptcy cause wherein Knetzer admitted under oath in open court, that since his bankruptcy he obtained more than Forty Thousand Dollars ($40,000.00) from plaintiff; and from which sum, payment had been made to William C. Dunham, his trustee under the turnover order (Tr. 160; original record 291-301)."

The original record to which we are thus cited does show that Knetzer testified that he had received from Jaffke more than $40,000.00 but it does not show what part, if any, of that amount was paid to the trustee. Even if the record had shown that Knetzer testified in that former hearing as petitioner claims, his testimony could not be considered as evidence in this matter because the trial court also granted the motion of counsel for the trustee to strike from the evidence the entire record of that former hearing.

Without the affidavit of Knetzer we find no sufficient evidentiary basis for the finding of the trial court that $36,000.00 of the money which Jaffke paid to Knetzer was delivered by Knetzer to the trustee. The order of the trial judge to turn over his concealed assets in the amount of $250,000.00 was served on Knetzer July 11, 1949. On November 1, 1949, the trustee reported that Knetzer had not complied. Knetzer was then ordered to appear on November 15, 1949, and show cause why he should not be adjudged in contempt. On December 1, 1949, Knetzer was held to be in contempt and ordered committed to jail until he had obeyed the turn over order, but execution of this order was stayed until January 11, 1950.

The evidence and stipulations of the parties indicate that others than Jaffke had been defrauded by Knetzer on the same story that Knetzer had told to Jaffke. These other persons included Riley, Petty and Sammons. Prior to

any payments to Knetzer by Jaffke, Riley paid Knetzer, between June 28, 1950 and September 15, 1950, the total sum of $32,389.00. Between April 14, 1951 and July 1951, Petty paid Knetzer $44,000.00; and between October 1, 1951 and February 1, 1952, Sammons paid Knetzer $101,550.00. Jaffke's payments to Knetzer amounted to $47,980.00 and were made between December 7, 1950 and October 22, 1951. The total amount thus paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the trustee.

During the month of December 1950 Knetzer made payments to the trustee in the total amount of $11,500.00. This amount might have been paid from the $250,000.00 in assets which the court found that Knetzer owned and had concealed, from the funds Riley had paid to Knetzer, or from the money Jaffke had paid to Knetzer. Although Knetzer was being pressed for payments on the turn over order he paid nothing further to the trustee during the months of January, February and March of 1951. During the months of April, May and June of 1951 Knetzer, or some one in his behalf, paid to the trustee $55,923.72. During that period Knetzer, in addition to the funds he had received from Riley and Jaffke, also received from Petty $44,000.00 which Knetzer may have paid to the trustee as part of the total paid to the trustee during that period. The last six payments of $1,000.00 each made by Knetzer to the trustee may have been from the $101,550.00 which Sammons paid to Knetzer between October 1, 1951 and February 1, 1952, or they may have been from the payments made by any one of the other three men from whom Knetzer had fraudulently procured funds.

A finding of fact by a trial court may not be based on a guess of what might have happened. It can only be grounded on evidence which supports a reasonable inference as to what did happen. We find no evidence remaining in this record after the Knetzer affidavit was excluded to justify an inference that $36,000.00 of Jaffke's money was paid over to the trustee.

The judgment is REVERSED and the cause remanded for further proceedings consistent with the views expressed in this opinion, with instructions to enter Judgment for the *Respondent-Appellant.*

SCHNACKENBERG, *Circuit Judge,* concurring. I concur in the foregoing opinion, with the exception that I believe the judgment should be reversed and there is no need for a remandment. Upon the hearing in the district court both parties had an opportunity to, and did, offer evidence which they considered relevant to all issues presented there and later in this court. There is no occasion now for a further hearing. Both sides have had their day in court.

(Per Order of February 13, 1956)

A true Copy

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

3d APPENDIX

ROBERT W. JAEFKE, Petitioner,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of Robert L. Knetzer, Bankrupt

352 US —, 1 L ed 2d 314, 77 S Ct —

[No. 60]

Argued December 12, 1956. Decided January 14, 1957.

SUMMARY

On certiorari to review a judgment of the United States Court of Appeals for the Seventh Circuit (229 F2d 232) reversing an order of the United States District Court for the Southern District of Illinois, sitting in bankruptcy, the Supreme Court reversed the judgment below and remanded the case to the Court of Appeals. The facts and holding of the Court are stated in the brief Per Curiam opinion infra.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Appeal and Error § 1256—sustaining judgment below

1. On appeal a successful party in the District Court may sustain its judgment on any ground that finds support in the record.

Appeal and Error § 1262—necessity of cross appeal—sustaining judgment

2. If the District Court was in error in striking an admissible affidavit offered by the successful party, a cross appeal is not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it

admissible, to find that it afforded evidence in support of the District Court's judgment.

Appeal and Error § 1692.2—remand—to consider affidavit

3. The Supreme Court will remand to the Court of Appeals a case in which that court failed to consider the admissibility and weight of an affidavit offered by the successful party in the trial court, because erroneously assuming that a cross appeal was a prerequisite to such consideration.

Courts § 878—federal courts—applying state law—bankruptcy

4. Whether a constructive trust is established by a bankrupt's payment to the trustee in bankruptcy of money obtained by the bankrupt by fraud from the claimant is a question governed by the law of the state in which the bankruptcy court is sitting.

APPEARANCES OF COUNSEL

Herbert J. Miller, Jr., of Washington, D. C., argued the cause for petitioner.

G. William Horsley, of Springfield, Illinois, argued the cause for respondent.

OPINION OF THE COURT

Per Curiam

We granted certiorari in this case to review a judgment of the Court of Appeals for the Seventh Circuit, 229 F2d 232, reversing an order of the District Court for the Southern District of Illinois, sitting in bankruptcy, which required respondent as trustee of a bankrupt's estate to pay $27,400 to petitioner. 351 US 949, 100 L ed 1473, 76 S Ct 847. The District Court's order was based on a finding that subsequent to the date of the adjudication of bankruptcy, the bankrupt had obtained money by fraud from the petitioner and had turned over $27,400 of that money

to respondent. At the hearing before the District Court, petitioner had sought to introduce into evidence an affidavit in which the bankrupt stated that he had paid $36,000 of the money he had received from petitioner to the respondent. At the conclusion of the hearing, the District Court sustained respondent's motion to strike the affidavit.

On appeal, the Court of Appeals held that petitioner had failed to prove that any specific portion of the money that he had given the bankrupt became a part of the funds in the hands of respondent. Because petitioner had not cross-appealed, the Court of Appeals held that it could not consider the action of the District Court in striking the bankrupt's affidavit from the record.

Headnotes 1 and 2

Headnote 3

A successful party in the District Court may sustain its judgment on any ground that finds support in the record. If the District Court was in error in striking an admissible affidavit, a cross-appeal was not a prerequisite for the Court of Appeals to rule on the admissibility of the affidavit, and finding it admissible, to find that it afforded evidence in support of the District Court judgment. United States v. American R. Exp. Co. 265 US 425, 435, 436, 68 L ed 1087, 1093, 1094, 44 S Ct 560; Langnes v Green, 282 US 531, 538, 539, 75 L ed 520, 524, 525, 51 S Ct 243. Since

the Court of Appeals did not consider the admissibility and weight of the affidavit, we remand to the Court of Appeals for its consideration of those issues.

Headnote 4

The claim in this case is that relevant admissible evidence established a constructive trust. Whether it did so or not is a question of Illinois law. The Court of Appeals, in the view it took of the case before it, did not reach this local question. On remand, that question too must be considered by the Court of Appeals.

Reversed and remanded.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, *Trustee* of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

BRIEF AND OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

G. WILLIAM HORSLEY,
816 Myers Building,
Springfield, Illinois,
Attorney for Respondent.

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BRIEF AND OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

I.

REPLY TO REASONS FOR GRANTING THE WRIT.

A. THE PETITIONER IS BOUND BY ADMISSIONS IN HIS BRIEF SUPPORTED BY THE RECORD, AND IS ESTOPPED TO OBJECT TO THE CONSIDERATION OF THE INDICTMENT.

The petitioner has given no reason to justify the assertion of jurisdiction by this court for the purpose of reviewing the action of the United States Court of Appeals in regard to its decision rendered May 2, 1957. The petitioner apparently concluded that the Court of Appeals in support of its reversal of the trial court's judgment, considered petitioner's Exhibit 30, being the indictment against Robert L. Knetzer for obtaining money under false pretenses, where that Exhibit had been stricken in the trial court at the instance of the respondent. These observations are apparent:

1. It was not necessary for the court to rely on the Exhibit for the reason that as the Court of Appeals noted, petitioner stated on page 19 of his brief in the Court of Appeals, that as a result of the grand jury hearing an indictment was returned against Knetzer on May 8, 1952, charging him with having obtained money by false representations from Jaffke in an amount exceeding $5,000 which was transported across State lines. This was a direct admission of this fact and it has been consistently held, at least where the statement of fact in the brief is not directly contrary to the record, that this is an admission against the party and relieves the court of resting a fact upon its judicial notice.

1. **Young & Vann Supply Co. v. Gulf F. & A. Ry. Co.**, 5 F. (2d) 421; CCA 5th, 1925, p. 423;
2. **Mandelbaum v. Goodyear Tire & Rubber Co.**, 6 F. (2d) 818; CCA 8th, 1925, p. 824;
3. **Oscanyan v. Arms Co.**, 103 U.S. 261, 26 L. Ed. 539; 1880, p. 263-265;
4. *Lemley* v. *Christophersen*, 150 F. 2d 291, CCA 5th, 1945, p. 292;
5. *Pitcairn* v. *Philip Hiss Co.*, 113 F. 492, CCA 3rd, 1902, pp. 494-495.

2. That petitioner is estopped to object to the consideration of the indictment itself for the reason that he injected this indictment in the record himself in questioning the respondent (Tr. 89) and this matter was not stricken from and is a part of the record. Furthermore, petitioner referred this Exhibit to the court obviously to lend weight to his assertion that he had been defrauded by Knetzer and it is strange indeed for him now to say that the court cannot consider the indictment in questioning the trustworthiness of Knetzer in making the affidavit relied upon by petitioner. This is contrary to the decisions of this court to the effect that an appellant cannot complain of errors in law in admission of his own evidence.

1. **Sprigg v. Bank of Mt. Pleasant**, 14 Pet. 201; 10 L. Ed. 419;
2. **Chicago & E. I. R. Co. v. Collins Produce Co.**, 249 U.S. 186, 39 S. Ct. 189, 63 L. Ed. 552.

3. The Court of Appeals did not initiate a rule that the losing party in the District Court may use evidence stricken on his own motion as a basis for the reversal of the trial court's judgment for the reason that, as appears from the order of the District Court (Tr. 167) petitioner's Exhibit No. 30 was stricken by the trial court. Any use of the indictment by the Court of Appeals was to sustain the trial court in the correctness of his ruling to the effect that the affidavit of Robert L. Knetzer was not admissible in evidence. Thus the use of the indictment was to sustain the trial court and not to reverse the trial court. It is, therefore error to assert that the decision of the Court of Appeals is contrary to this court's decision that petitioner could urge any ground in the record in support of the trial court's judgment. Under the same authorities petitioner relies upon, the respondent would have had no

standing to appeal the striking of the affidavit and indictment even if he had so desired, as the rulings of the court on this issue were in his favor. When the petitioners placed these documents in the record, the Court of Appeals had every right to consider them.

a. Petitioner has cited no cases in point to indicate that the action of the Court of Appeals is contrary to the decisions of this court or which indicate that this court has ever considered the exact issues raised on this matter of appellate procedure to be of sufficient importance to devote its time for a determination.

II.

THE AFFIDAVIT OF ROBERT L. KNETZER WAS PROPERLY STRICKEN BECAUSE IT WAS NOT MADE UNDER THE CIRCUMSTANCES RENDERING IT TRUSTWORTHY.

Petitioner stated on page 8 of his petition that the question of whether or not the declarations of the bankrupt fell short of having been made under circumstances rendering them trustworthy went to the weight of the evidence and not to its admissibility. Petitioner cites in support thereof the case of *F. W. Woolworth Co.* v. *Contemporary Arts*, 97 L. Ed. 276; 344 U.S. 228, 73 S. Ct. 222. This case does not so hold and is no authority for any such statement, but merely holds a party cannot complain of exclusion of evidence in response to his own objection. Petitioner cites Corpus Juris Secundum Volume 31, Section 217, page 959, but failed to emphasize one of the requirements for the admissibility of the declaration against interest noted in this section, and that is, that the circumstances rendered it improbable that a motive to falsify existed. Likewise on page 963 it is indicated that the declarant must have a pres-

ent interest at the time of the declaration and that declarations of a former owner of property are excluded, and on page 965 it was noted that to render a declaration against interest admissible there should be a circumstantial guarantee of the trustworthiness of the declaration.

The Illinois cases cited on page 9 establish no doctrine to the effect that the court may not condition the admissibility of the declaration against interest on its being made under circumstances so as to render it trustworthy. The case of *Keshner* v. *Keshner*, 376 Ill. 354, 33 N.E. (2d) 877, involved a citation to discover assets and the court did allow the donor to impeach a gift of some United States bonds by admitting into evidence a letter he had written alleging among other things that the bonds which his daughter had in her safety deposit box belonged to him. In the cases of gifts of property, this is contrary to a later case, *Houdek* v. *Ehrenberger*, 397 Ill. 62, 72 N.E. (2d) 837, and an earlier case, *Whipple* v. *Carrico*, 305 Ill. 164, 137 N.E. 84, cited in Section 326, 31 Corpus Juris Secundum, page 1104. This case was not expressly overruled in the Keshner case. The Keshner case is likewise contrary to other Illinois cases where sales of both realty and personalty, and not gifts of property, were involved.

1. **Myers v. Kinzie**, 26 Ill. 36; (Insolvency);
2. **Dausch v. Barker**, 329 Ill. 410, 160 N.E. 765;
3. **Cook v. Korshak**, 301 Ill. 603, 134 N.E. 49;
4. *Milling* v. *Hillenbrand*, 356 Ill. 310, 40 N. Ed. 941;
5. *Illman* v. *Kruse*, 301 Ill. 408, 134 N.E. 107.

The case of *Friberg* v. *Donovan*, 23 Ill. App. 58, merely involved a declaration by a deceased maker of a note that a certain party was a surety on the note although this fact did not appear on the face of the instrument. The case

of *Hughes* v. *Eldorado Coal and Mining Co.*, 197 Ill. App. 259, involved a situation where under an action for wrongful death, the statement of the deceased buddy corroborating the defendant's theory as to the cause of an explosion in the mine was admitted as a declaration against interest where the declarant was also injured by the same explosion. *Schell* v. *Weaver*, 225 Ill. 158, 80 N.E. 95, was a case in which the decedent had admitted that he owed a certain person $1,000 borrowed money and some interest. This was admitted as a declaration against interest in an action on the loan. The case of *In re Thompson*, 295 F. 556 was also before the court in 197 F. 681 and involved a reclamation proceeding. In those cases the court admitted the sworn statement made by the bankrupt at a creditor's meeting although the bankrupt was at that time deceased. These were the only statements allowed in evidence which were made after the bankruptcy of the debtor and the court specifically stated on page 683 in 197 Federal Reporter as follows:

> "'*Such testimony is not to be classed with declarations made out of court.* It is judicial in its nature and with reference to it the trustee may properly be said to be in privity with the bankrupt, and, while not concluded by the bankrupt's admissions made therein, they are admissible against him in controversies arising in such bankruptcy proceedings.' (Italics ours.)"

The only oral statements which the bankrupt in the foregoing case made outside of court disclaiming ownership were all made prior to the time of the petition in bankruptcy, and at a time when the bankrupt was in possession and using the dredge which was the subject of the reclamation proceedings. The case of *Clark and Jones* v. *American Mutual Liability Insurance Co.*, 112 F. Fed. Supp. 889, involved an admission by an employee who stated that for the five year period prior to the time of his statement,

he had appropriated plaintiff's funds in the amount of $6.50 per day. Declarant was dead at the time of the action on the comprehensive claims insurance policy against the insurer. These facts were set up in the complaint and the court refused to strike them as they felt that this matter constituted an admission against interest by the declarant and should be admitted in the action.

These cases all have one thing in common, and that is, that there was nothing in them which would indicate any motive for misrepresenting the statement made. The possible exception is the *Kreshner* case which is not consistent with all of the other Illinois authorities in that those representing the alleged donor of property were allowed to impeach a previously executed gift, although the case was not clear as to when the gift had been supposedly made. Furthermore, none of these cases set forth any doctrine which would indicate that the Court of Appeals committed error under the Illinois law by considering whether the circumstances were such as to render the statements in the affidavit of Knetzer trustworthy.

It is apparent from the face of the affidavit itself, it being petitioner's Exhibit 24 (Tr. 203) that petitioner's statement on page 10, that Knetzer by the affidavit admitted doing the acts which were the essential elements of the crime for which he was charged in the indictment, is incorrect. Knetzer merely admitted that during the period of December 7, 1950 to October 23, 1951, that he "borrowed" the sum of $47,380.00 from Robert W. Jaffke. This is no more than he had previously admitted in the informal conference before Judge Briggle as set forth in petitioner's Exhibit 29, where he was represented by counsel for petitioner and assured the court that he would raise the money to pay on the turn-over order, but that he had no intention of using illegal means and would not do so.

If the statement made on page 10 by the petitioner is correct, that there is nothing in the affidavit which questions title to the money, it would appear that petitioner's case is defeated. He sought to raise a constructive trust which is a property relationship, and necessarily requires him to trace his property to any third party into whose hands it may have come. Certainly it was in derogation of the title of the trustee to say that some of the money in his hands is money subjected to a constructive trust on behalf of another. Petitioner's statement is true, he has no more than a contract claim and should be relegated to the position of any other creditor of Knetzer's.

III.

THE COURT OF APPEALS FOLLOWED THE MANDATE OF THIS COURT AND CORRECTLY CONSIDERED THE ILLINOIS LAW ON CONSTRUCTIVE TRUSTS.

The petitioner continually harps on the statement that the trustee in bankruptcy should have investigated the source of the funds which Knetzer paid over to him from time to time. The complaint here is being made by the same petitioner who has sustained his contention in the trial court that Knetzer defrauded him, who himself admitted that he later knew that Knetzer could not be trusted. The evidence shows that Knetzer never paid by anything but cash and would have been ridiculous in view of his reputation to suppose that any questioning by Dunham would have resulted in a truthful discourse by Knetzer when he obviously lied under oath when he appeared before Judge Briggle. Dunham certainly did all that he could to faithfully discharge his duties.

The petitioner cites several cases on page 12 which he

claims support his statement that the recent Illinois decisions place a lesser burden on a claimant in identifying his property in establishing a constructive trust. These cases support no such contentions. The cases of *Winger* v. *Chicago City Bank and Trust*, 394 Ill. 94, 67 N. E. (2d) 265; *The People* v. *State Bank of Maywood*, 354 Ill. 519, 188 N. E. 853 are not in point on the facts, as the *Winger* case was a case where the policy holders of an association sought to raise a constructive trust because certain directors dealt with the property of the association to their own advantage. The court placed the same burden of identification of property on the plaintiffs, but did say that where there was a fiduciary relationship such as a trustee, and he commingles trust funds with his own property, that the burden is upon him to show what was his individual property before the commingling took place.

The *People* v. *State Bank of Maywood* case was a proceeding by the receiver appointed by the State Auditor to liquidate an insolvent bank wherein the Village of Maywood sought to establish a preferred claim because the bank accepted deposits illegally in an amount in excess of the sum of which the Village held in surety bonds to protect the deposit. Respondents regard this case as setting forth in excellent fashion the law of Illinois, and that case noted this doctrine of Illinois on proof of tracing, that, if at any time the withdrawals from the commingled account leave a balance less than the trust money, that fund must be regarded as dissipated except as to this balance and deposits substantially added to the account from other sources may not be attributed to the trust fund. The gist of this case is therefore that petitioner not only held the burden of proof that Knetzer received his money, but he must prove that where it was obviously commingled that Knetzer at all times held a balance

equal to or in excess of the trust money paid over to him and that this trust money was delivered to Dunham, the trustee in bankruptcy, where it still remains. This, petitioner has obviously failed to do. The proof of tracing is woefully weak.

The following chart, we believe, is a pretty clear picture as to the transactions involved, and is taken from the record and is what was used by the Circuit Court of Appeals in reaching the conclusion that it did.

Riley testified that he paid Knetzer as follows:		Jaffke testified that he paid Knetzer as follows:		Petty testified that he paid Knetzer as follows:	
6-28-50	250	12-7-50	6,100	4-14-51	5,000
6-30-50	1,000	12-13-50	12,500	4-29-51	7,500
7-2-50	600	12-18-50	7,500	5-4-51	8,500
7-18-50	6,000	12-21-50	9,000	5-10-51	8,000
7-27-50	9,000	1-3-51	6,000	5-28-51	14,500
8-2-50	200	1-8-51	1,000	6-51	500
8-10-50	8,000	3-14-51	520		
8-15-50	2,208	5-21-51	260		$44,000
9-12-50	2,831	Aug. 51	300		
9-15-50	2,300	Oct. 51	2,000		
		Oct. 22, 51	2,800		
	$32,389		$47,980		

It was stipulated that Gerald Sammons paid to Knetzer between October 1, 1951, and February 1, 1952, the sum of $101,550.00.

The Trustee was called as an adverse witness by the petitioner and asked about the dates when he received monies on the turn-over order. It must be remembered that his interrogation was limited to monies received between

October 19, 1950 and November 1951 (R. 87). The dates, by whom paid and to whom, and the amounts are as follows: (R. 77-87)

	Monies paid direct to	
Dec. 8, 1950	G. W. Horsley	5,000
Dec. 13, 1950	Currency from Robert L. Knetzer to Dunham	3,500
Dec. 22, 1950	Knetzer paid to Horsley	1,500
Jan. 1951	No payments	
Feb. 1951	No payments	
Mar. 1951	No payments	
Apr. 9, 1951	Knetzer paid to Horsley	5,000
Apr. 14, 1951	Attorney Cohn paid to Dunham	5,000
Apr. 19, 1951	" " " " "	5,000
Apr. 23, 1951	" " " " "	5,000
May 1, 1951	" " " " "	5,000
May 7, 1951	" " " " "	5,000
May 10, 1951	" " " " "	5,000
May 21, 1951	" " " " "	5,923.72
May 24, 1951	" " " " "	5,000
May 29, 1951	" " " " "	5,000
June 4, 1951	" " " " "	5,000
Oct. 11, 1951	" " " " "	5,000
Oct. 21, 1951	" " " " "	5,000
Nov. 13, 1951	Rex Rhodes paid to Dunham	1,000
Nov. 14, 1951	" " " " "	1,000
Nov. 15, 1951	" " " " "	1,000
Nov. 16, 1951	" " " " "	1,000
		$ 79,923.72

Thus, it is apparent, from the foregoing, that Jaffke testified that he gave to Knetzer the sum of $42,100.00 during the period from December 7, 1950 through January 8, 1951. However, the Trustee received on the turn-over or-

der, either from Knetzer or anyone for and on his behalf, during that same period of time, only the sum of $10,000.00. It is further significant to note that the petitioner testified that he gave to Knetzer $6,100.00 and knew that it was for the purpose of being applied on the turn-over order. It is further significant that during the months of January, February and March, the Trustee did not receive any payments on the turn-over order. During the period from January 8, 1951 through October, 1951, Jaffke testified that he advanced to the Bankrupt only the sum of $1,080.00. Yet, during that same period of time, a man by the name of Petty testified that he gave to Knetzer the sum of $44,000.00, and it is further significant that, beginning on April 9th, Knetzer paid $5,000.00 to the Trustee and thereafter Attorney Cohn paid to the Trustee several sums of money, which, up to November 1st, totaled $65,923.72.

Thus, the Circuit Court of Appeals properly analyzed this situation in its opinion when it said:

> "The total amount paid to Knetzer by these four men was $225,919.00. Of this amount Knetzer paid to the Trustee during the period here in question only $79,923.00. It is evident, therefore, that $145,996.00 of the amount Knetzer received from these four men was not paid over to the Trustee."

The Court then goes on to analyze the exact periods of payment, matching them up with the dates when Jaffke testified that he gave Knetzer money, and finds that the payments to the Trustee could have been made by any one of the men.

The most significant fact is that Attorney Cohn was called as a witness by the petitioner, but he does not shed any light whatsoever upon the tracing of the funds. His only statement was that he paid the money to the Trustee and part of it came from the Bankrupt and part of it came

from other persons, whom he did not identify. He, therefore, in effect disproved petitioner's theory because he did not testify that the petitioner ever gave him any money and that although the petitioner was in his office one time in the company of the Bankrupt, it was not on an occasion when the Bankrupt gave him any money.

In fact, Attorney Cohn testified that during the period, April 14, 1951 to November, 1951, he paid approximately $70,000.00 to the Trustee and could only say that more of it was paid to him by the Bankrupt than any other person. Even if we assume that $35,000.00 of it was paid to him, it is less than the $44,000.00 which Knetzer received from Petty during that same period of time, a time during which Jaffke testified that he did not pay anything to the Bankrupt, except for a small sum during the summer which amounted to approximately $1,000.00. Therefore, if petitioner is relying upon inferences, then his own witness, by inference has proved that it was not his funds that came into the hands of the Trustee but the funds of Clint Petty or someone else. (R. 134-135.)

Furthermore, petitioner himself testified that he had no personal knowledge, other than as to the first $6100.00, how much of his money was turned over to Dunham by Knetzer. (Tr. 126.) The remaining two cases of *Edgerton v. Johnson*, 178 F. (2d) 106 and *Soderstrom v. Kawasheha Packing Co.*, 169 F. (2d) 1008 merely reiterate the same presumption where there has been commingling by the trustee, which respondents contend adds and does not detract from the troubles which petitioner has in attempting to trace his property into the hands of William C. Dunham.

The Illinois cases cited by petitioner sustain the contentions of respondents, that petitioner cannot trace his property and is therefore not entitled to a priority in this

reclamation proceeding. *St. Louis & San Francisco Co. v. Spiller*, 47 S. Ct. 635, 274 U. S. 304, 71 L. Ed. 1060; *In re Harrigan Supply Co.*, 2 Fed. (2d) 791; *Board of Commissioners v. Strain*, 157 Fed. 49, 84 CCA 553; *John Deere Plow Co. v. McDavid*, CCA 8th 1905, 137 Fed. 802; *In re A. D. Matthews & Sons*, 238 Fed. 785. Likewise the burden is upon the petitioner to trace his funds into the hands of the trustee in bankruptcy. *Schuyler v. Littlefield*, 232 U. S. 707; Volume 5A, Remington on Bankruptcy, 1950 Edition, Section 2480, pages 291 and 292; Section 2925, page 92, Volume 4, Trusts and Trustees, Bogert, 1748. The case of *Standard Oil Co. of Kentucky v. Hawkins*, 74 Fed. 395 adds nothing to the position of petitioner because it was merely a case where a bank under the active supervision of the president on the last day it was open, accepted a deposit from the plaintiff knowing that it was insolvent. The receiver of the bank had paid out a 25% dividend to the creditors after plaintiff had filed a claim as a general creditor, but the court allowed him to withdraw it and seek a preferred claim on the basis of a trust. There is no question, as the court indicated on page 402, that the funds of the plaintiff were traced to and received by the receiver. This is in sharp distinction to our case where the proof falls short of tracing the funds into the hands of the trustee in bankruptcy.

The remaining case cited by petitioner is *City of New York v. Reisner*, 127 F. (2d) 703. This was a case where the New York City Sales Tax Law specifically made the vendor a trustee for the City in regard to sales tax money. The New Bedford Rest Period, Inc. filed a petition for reorganization and remained in possession; however, it failed to segregate the taxes collected from vendee as required by the sales tax statute. The court held that there was nothing in the bankruptcy law to prevent the City of

New York from being given a statutory lien for the sales tax money and since the debtor was operating under the control of the bankruptcy court, it was not necessary to trace the fund due the City. In view of this breach of statutory duty by the debtor in possession, under the authority of the bankruptcy court, the case is readily distinguishable from the instant case.

The court, in its decision, considered the Illinois law on the question of constructive trusts on page 3a of the opinion, but correctly held that petitioner had fallen short in his proof of tracing his funds into the hands of the trustee in bankruptcy. The Court of Appeals certainly placed no greater burden on the petitioner than was required by both the Illinois decisions and the decision of this court.

WHEREFORE, William C. Dunham, trustee of the estate of Robert L. Knetzer, deceased, bankrupt, petitioner, prays this Honorable Court to deny this petition for certiorari to the United States Court of Appeals for the 7th Circuit so that the mandate can issue from the Court of Appeals and the administration of the bankrupt estate concluded with due dispatch.

Respectfully submitted,

G. William Horsley,
816 Myers Building,
Springfield, Illinois,
Attorney for Respondent.

FILED
NOV 7 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, *Trustee* of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

PETITION FOR REHEARING

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorney for Petitioner.

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v.

WILLIAM C. DUNHAM, *Trustee* of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

PETITION FOR REHEARING

To the United States Supreme Court and the Justices Thereof:

Robert W. Jaffke, petitioner in the above entitled cause, presents this, his Petition for Rehearing after denial of certiorari as governed and prescribed by Rule 58 of Revised Rules of Supreme Court, effective July 1, 1954, and in support thereof, respectively shows:

I.

SUMMATION OF THE ACTIVITY OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CAUSE.

On January 13, 1956, the Court of Appeals filed its initial opinion and its judgment order which reversed the Trial Court's judgment and remanded the cause to the Trial Court for further proceedings consistent with the views expressed in its opinion, then, on February 13, 1956, the court entered an order changing the remand portion of the judgment order by deletion of the words "for further proceedings consistent with the views expressed in this opinion," and added the words "with instructions to enter judgment for the respondent-appellant." (PETITION FOR WRIT OF CERTIORARI — 16a, SUPREME COURT RECORD, PAGE 202.) No Petition for Rehearing had been filed nor no rehearing of the cause had been held prior to the amendment of the judgment order as the respondent had filed a Motion to Modify Judgment, or in the alternative, Motion for Clarification of Opinion and Judgment. This motion was based on the ground that since the entering of the opinion in the Court of Appeals the presiding Judge in the Trial Court had died, that both of the parties had had their day in Court and had presented all the available evidence, and that to further prolong the litigation would unduly hamper the closing of a bankrupt estate. (SUPREME COURT RECORD 187-188.)

A motion to modify an appellate judgment must be based on good and sufficient grounds; otherwise, it should be denied. Here, the motion was manifestly lacking in merit as the only ground was the untimely death of the trial judge and not a legal basis for a modification of a judgment. This arbitary action of the Court of Appeals had the effect

of denying petitioner an opportunity to file a Petition for Rehearing as petitioner was required to file an Answer to the Motion to Modify and under the rule of that Court, the fifteen (15) day limitation period for the filing of a Petition for Rehearing had expired.

Not only was it unfortunate that petitioner was deprived by this amended order of an opportunity for further proceedings in the Trial Court, but he faced the further dilemma that he had raised in his Answer the point of a cross-appeal and argued that it was not necessary for a cross-appeal to be filed in the Court of Appeals for that Court to consider all evidence in the record. Thus, petitioner had cited to the Court of Appeals the same authority on the question that this Honorable Court set forth in its opinion in this cause which reversed the Court of Appeals' decision on that point of law. (SUPREME COURT RECORD, PAGE 195, 189-201.)

On May 28, 1956, this Honorable Court entered its order allowing Certiorari, (SUPREME COURT RECORD, PAGE 202) and on January 14, 1957 reversed the opinion of the Court of Appeals and remanded this cause to the Court of Appeals for the consideration of the admissibility and weight of an affidavit without a cross-appeal and whether or not relevant admissible evidence established a constructive trust. (PETITION FOR CERTIORARI 19a-20a.) On remand from this Honorable Court, the Court of Appeals did not grant a rehearing of the cause, but only requested of the respective counsel of the parties herein that suggestions in typewritten form, be submitted to the Court on the questions of the admissibility of the affidavit and the establishment of a constructive trust. It can be fairly stated that at the time of oral argument in this Honorable Court, counsel considered mentioning the hope-

lessness of petitioner's cause in the event that this Court should reverse the case with a remandment for further consideration in the Court of Appeals. It had become apparent from its action that the Court of Appeals, without regard for Petitioner's legal rights, was determined to reverse the judgment of the Trial Court. The reinstatement of its prior reversal substantiates that viewpoint.

II.

THE EQUITIES OF THE CASE

On December 1, 1952, petitioner initiated this proceeding when he filed a Petition for reclamation in the subject bankruptcy naming Robert L. Knetzer individually, and William C. Dunham, Trustee of the estate of Robert L. Knetzer, a bankrupt, as respondents therein. The Petition was heard and evidence taken on the 14th and 15th days of October, 1954, and the case proceeded against the sole respondent, William C. Dunham, as Robert L. Knetzer died on August 26, 1953. (SUPREME COURT RECORD, PAGE 35.) On April 18, 1955, the Trial Court entered its findings of fact, conclusions of law and judgment ordering petitioner recover of the respondent the sum of $27,400.00. The first conclusion of law of the Trial Court held that courts of bankruptcy proceed upon equitable principles, and the equities in this case are with the petitioner. (SUPREME COURT RECORD 166.) Hence, as the successful party in the Trial Court, petitioner has been involved in litigation for a period of five (5) years, two and one-half (2½) years of which time has been spent in an Appeal Court in an endeavor to sustain his judgment.

Unquestionably, this is a unique case, particularly, where a trustee in bankruptcy as an officer of the bankruptcy court spends two and one-half (2½) years in litigation for the

purpose of reversing its order. Respondent-Trustee further seeks to retain intact funds received from the bankrupt as payments under a turn-over order which payments the bankrupt was permitted to make in installment payments over a long period of time. (SUPREME COURT RECORD 86-87.) A turn-over order is an adjudication that a bankrupt has in his possession at the time of the entry of the order, certain assets that he is withholding from his trustee. It does not include property that the bankrupt obtained from other persons after his adjudication in bankruptcy.

A Bankruptcy Court is a court of equity and is guided by equitable principles as the trial court concluded. A petition seeking a return of property in the possession of a trustee in bankruptcy calls for the weighing of the equities of the respective parties. It is a contest of title and the mere fact that the trustee is in possession of the property in question does not render him an advantage as he succeeds only to the title held by the Bankrupt. During the period covered by this cause, the Bankrupt Knetzer was never charged with an offense under the Bankrupty Act by the respondent trustee; therefore, the conduct of the Bankrupt during the period in question from December 7, 1950 to November 1, 1951 weighs heavily against the equities of the respondent.

When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the case to the Court of Appeals which this Honorable Court did; however, where the record is slim and the relevant standards are not difficult to apply, this Court in the interest of substantial justice can reconsider the sufficiency of the evidence as justice may require. *J. J. O'Leary vs. Brown, Pacific, Maxon,*

Inc., et al., 340 U.S. 504, 95 L. Ed. 483. This Court in the case of *United States vs. Ohio Power Company*, 353 U.S. ——, 1 L. E. 2nd 683, on the question of interest in finality of litigation yielding to the interest of justice held that a petition for rehearing should be considered even though certiorari had been previously denied. Petitioner's short lived victory in the trial court has been a costly one. The equities lie with Petitioner in this cause. Equity and justice cogently demand a reconsideration of the cause by this Honorable Court.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a Rehearing be granted and that the Petition for Certiorari be given further consideration.

Dated November 5, 1957.

Respectfully submitted,
WILLIAM M. GIFFIN
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, counsel for the above named petitioner, do hereby certify that the foregoing Petition for a Rehearing of this cause is not presented for the purpose of delay or vexation, but is presented in good faith and is well founded in law and in fact and proper to be filed herein.

Counsel for Petitioner.

WILLIAM M. GIFFIN
First National Bank Building
Springfield, Illinois
Attorney for Petitioner.